SEP 27 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 453

LEHIGH VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives and their or any of their heirs, devisees, executors, administrators, grantees, assigns or interest, and any and all persons claiming by or through them or any of them; MARY HUSE BEARDSLEY, widow; ROBERTA B. HORTON and LUCIAN B. HORTON, her husband; MALCOLM CAMPBELL surviving spouse of HELENA B. CAMPBELL; RUTH N. DILL and THOMAS M. DILL, her husband; HELEN B. MANCHEE, Individually and as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL, and RICHARD B. MANCHEE, her husband; FIRST NATIONAL IRON BANK OF MORRISTOWN, as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL and as co-trustee u/l/w/t of KATHERINE N. BONSALL; ALIDA BEACH BONSALL; KATHERINE B. STRONG, Individually and as co-trustee u/l/w/t of KATHERINE N. BONSALL and JOHN VR. STRONG, her husband; HORACE JEFFERS, as co-trustee u/l/w/t of KATHERINE N. BONSALL; ANTHONY RUTGERS NIELSON and MARY NIELSON, his wife; HELEN N. BENT and CHARLES BENT, her husband; ROSLYN C. HALVORSEN, widow; FLORENCE ROBINSON, widow; FORDS PORCELAIN WORKS, INC.; and unknown claimants and their heirs, devisees and personal representatives, and their or any of their successors in right, title and interest,

Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered in the above entitled cause on June 5, 1961, petition for rehearing denied on June 30, 1961.

Opinions Below

An oral opinion of the judge of the Superior Court, Chancery Division, Middlesex County, Docket No. C-258-59, granting plaintiff's motion for a summary judgment rendered by the Honorable FRANK J. KINGFIELD, J.S.C., is included in appellant's appendix filed below, at 19a.

The opinion of the Supreme Court of New Jersey, No. A-108, decided June 5, 1961, by the Honorable VINCENT S. HANEMAN, Justice, not yet reported, is included as Appendix A.

Jurisdiction

1. The judgment of the Supreme Court of New Jersey was pronounced on June 5, 1961, and the petition for rehearing was denied on June 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3).

2. It is believed that the following cases sustain the jurisdiction of this Court:

> *Cincinnati* v. *Vester*, 281 U. S. 439 (1930);
> *Great Northern Railway Company* v. *United States*, 315 U. S. 278 (1942).

3. The Supreme Court of New Jersey is the highest court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of New Jersey.

5. The constitutional question of substance which was decided by inference in the State Supreme Court was that notwithstanding Section 1 of the 14th Amendment to the Federal Constitution a privately owned corporation vested only in terms of general language, see Appendix D, with the power of eminent domain may acquire private property ostensibly for railroad purposes through condemna-

tion, thereafter abandon the same use, and subsequently convert the land to private use, namely to engage in land speculation.

6. The constitutional question was timely raised on appeal to the State Supreme Court. The Supreme Court having certified the matter on its own motion precluded a hearing in a court of lower appellate jurisdiction. The constitutional questions, both Federal and State, were clearly presented to the court in petitioner's briefs, and at oral argument.

In the opinion of the Supreme Court of New Jersey, handed down on June 5, 1961, the court failed to address itself to the Federal Constitutional question upon which it was requested to pass upon. The petitioner thereupon, in its petition for a rehearing again requested the court to decide the pertinent constitutional question which pervaded this case, and this request was again denied.

From the final judgment of the Supreme Court of New Jersey, the petitioner has no further appellate remedy under the laws of the State of New Jersey. Rule 1:9 of the New Jersey Revised Rules, provides that entry of final judgment occurs upon the denial of the petition for rehearing. The petition for rehearing was denied on June 30, 1961.

Questions Presented

1. Whether the finding that a privately owned railroad, vested with the power of eminent domain can within constitutional limitations acquire land belonging to another ostensibly for railroad purposes, and thereafter abandon the railroad facilities and subsequently offer to sell the said land for private gain.

(i) Where the petitioner protests the railroad's claim to be a fee simple absolute, and contends that only a fee simple determinable was acquired.

(ii) Where the petitioner contends that the Act incorporating the plaintiff railroad and vesting it with the power of eminent domain did not expressly provide that a fee simple title was acquired of lands taken by condemnation proceedings.

(iii) Where the courts of New Jersey have traditionally and in accord with all other jurisdictions in this country never imputed to the Legislature an intent to give a railroad the power to acquire a fee simple absolute by eminent domain, from general language delegating such power.

Constitutional Provisions Involved

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Statement of the Case

I. Procedural History of the Case

The cause was initially brought in the Superior Court, Chancery Division, Middlesex County wherein the plaintiff railroad sought a judicial declaration construing the special acts of the Legislature pursuant to which the lands of the defendant were condemned and adjudging that the plaintiff has a perfect fee simple absolute title to the said lands.

Pursuant to plaintiff's motion for a summary judgment the court held that the plaintiff had a perfect title to the said lands.

The defendants thereupon brought an appeal in the Superior Court, Appellate Division. With the appeal in this posture the New Jersey Supreme Court, on its own motion certified the matter and the appeal was heard in that Court, wherein the finding of the Chancery Division was affirmed on June 5, 1961. A petition for rehearing was denied on June 30, 1961. The petitioner has no further remedy for appellate review in the courts of New Jersey.

II. The Facts Material to the Questions Presented

The petitioners owned a large tract of land located in Perth Amboy, New Jersey in 1872. In that year the plaintiff railroad was created by an Act of the Legislature of the State of New Jersey, entitled, "An Act to Incorporate the Bound Brook and Easton Railroad Co.," P.L. 1872, Chapter CX, page 314, see Appendix D. Thereafter, through consolidation, not here pertinent, the plaintiff acquired its present title, the Lehigh Valley Railroad Company.

The plaintiff proceeded to make application pursuant to the Charter aforesaid, to the court whereby commissioners were appointed who examined the lands of the defendant, Mary Chapman, now deceased and who thereafter made a report of their appraisal and assessment of damages. The report was duly filed and pursuant thereto the plaintiff proceeded to lay its railroad tracks across the said lands of the defendant, Mary Chapman.

Thereafter the lands were used by the plaintiff pursuant to its charter. Subsequently, the railroad abandoned its use of the land for railroad purposes and on January 31, 1958, contracted to sell to the Fords Porcelain Works a portion of the lands it had acquired from the defendant in the manner aforesaid.

When a title company refused to approve plaintiff's claim to a fee simple absolute title and would not issue a title policy thereon, the plaintiff instituted the present action seeking judgment of the Chancery Division that it owned a fee simple absolute under authority of its charter.

The question which was decided on a motion for summary judgment was whether the plaintiff obtained a fee simple absolute by virtue of the above referred to condemnation proceedings or whether it obtained a title in fee simple determinable, conditioned upon the continuous use of the lands for railroad purposes, and that upon abandonment

by the plaintiff of that use, a fee simple absolute automatically reverted to the heirs and devisees of Mary Chapman, the defendant?

III. Federal Question Raised Before the Supreme Court of New Jersey

The petitioners in their appeal from the adverse judgment rendered in the granting of plaintiff's motion for a summary judgment argued in their briefs that to construe the general legislative enactment granting to this private corporation the power of eminent domain and thereby obtaining a fee simple absolute title to lands condemned would contravene both the State and Federal Constitutional prohibitions against the taking of private property without just compensation and without due process of law.

The petitioners vigorously argued this point both in their briefs and also in the oral argument. Nevertheless, the Supreme Court of New Jersey failed to address itself to the constitutional questions presented. The court was again requested in a petition for rehearing to specifically address itself to these questions, and it again refused.

The petitioner, therefore, has been precluded from having this vital constitutional issue resolved by a court of last resort in New Jersey.

ARGUMENT

I

Certiorari should be granted because an important question bearing upon the implications of excess condemnation is involved: The effect of such use of condemnation as it relates to Section 1 of the 14th Amendment requires clarification.

Where the authority granting the power of the exercise of eminent domain does not expressly or impliedly specify the nature of the title acquired by the condemnor of property, then only such an estate or interest may be taken as is reasonably necessary to answer the purposes for which the corporate franchise was granted, see C.J.S. Vol. 30, section 449, pages 197-198. This principle has been recognized both in New Jersey and elsewhere, *Valentine* v. *Lamont*, 13 N. J. 569 (1953), at page 576; *Currie* v. *New York Transit Co., etc.*, 66 N. J. Eq. 313 (E. & A. 1903); *Manning* v. *N. J. Short Line Co.*, 80 N. J. L. 349 (E. & A. 1910); *Summerhill* v. *Hunt*, 25 N. J. Misc. 498 (Sup. Ct. 1947). The use of this extraordinary power which operates *in invitum*, must be carefully employed, and when used must be judiciously restricted so as to avoid the unwarranted deprivation of one's constitutionally protected property rights.

The impact of this decision, if permitted to stand, is that private property lawfully taken through eminent domain proceedings for a particular corporate purpose by a privately owned corporation can thereafter be converted by the corporation to a private use and at a propitious moment sold at a substantial gain, all to the detriment of the condemnee. Such a result violates the condemnees constitutional rights as provided for under Section 1 of the 14th Amendment.

II

The condemnor acquired a fee simple determinable and no more by its taking of defendant's lands pursuant to the statute which created it and the quantity of the interest cannot now be increased.

The right to acquire lands for railroad purposes through eminent domain in derogation of the constitutionally protected rights of those citizens whose property is condemned, must be construed as conferring no right to hold the property for purposes other than those for which it was lawfully taken. Thus by necessity where the condemnor is a private entity any property so acquired must be subject to the limitation that its continued possession is dependent upon the continued use for which it was originally acquired. The title to such land must accordingly be qualified or limited in keeping with the method by which the property was acquired. To enlarge the quantity of the fee to the point of being absolute after the railroad has abandoned the purposes for which the land was lawfully taken is to invade the constitutionally protected right to be secure against the unwarranted taking of private property.

If this decision is allowed to stand the extraordinary power of eminent domain will now be available as a means for circumventing the revered and venerated constitutional guaranty against the seizure by one of the property of another. The case of *Henry* v. *Columbus Depot Co.*, 135 Ohio 311, 20 N. E. 2d, 921 (1939) clearly expressed the deleterious consequences thusly:

> "In the case of public corporations, public funds are expended for more or less permanent purposes, but, if there is a subsequent abandonment of the public project, the funds will be devoted to some other public use. On the other hand, authority to appropriate private property is given to quasi-public corporations for the

purposes of serving the public, and when that service ceases the right to hold the property ceases and reverts to the owner from whom the property right was taken, or to those claiming under him. *Any other rule would result in abuses.* It would permit private corporations to condemn property ostensibly for public purposes, but when the fee was once acquired it could devote the property to any use, and thus employ the extraordinary power of eminent domain to acquire property for ultimate private use." (Emphasis supplied.)

III

Certiorari should be granted to settle the constitutional question that was left unresolved below.

The implications of the New Jersey Supreme Court's holding is that it tacitly is at odds with the U. S. Supreme Court's position in *Great Northern Railway Co.* v. *United States, supra*, where the court dealt with the 5th Amendment.

Constitutional questions of such import should not be interpreted by silence or at best by inference. The court was squarely presented with the question, and in fact called upon counsel at oral argument to address themselves to the issue. Failure to thereupon consider the question in reaching its opinion can only lead to needless confusion. The consequences of this case will have a far reaching effect on all lands acquired by eminent domain and the significance of this case in its present state can only lead to innumerable questions and disputes which ultimately will call for review by the United States Supreme Court.

CONCLUSION

Therefore petitioners respectfully request that a writ of certiorari issue to the New Jersey Supreme Court.

Respectfully submitted,

PHILIP L. STRONG,
Counsel for Petitioners.

Appendix A

Opinion of Supreme Court of New Jersey (A-108 September Term 1960)

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives, etc., et al.,

Defendants-Appellants.

Argued April 11, 1961—Decided June 5, 1961.

MR. CHARLES W. HUTCHINSON argued the cause for Plaintiff-Respondent (MESSRS. LAMB, LANGAN & BLAKE, attorneys).

MR. JOHN VR. STRONG and CATHERINE D. MCANDREW argued the cause for Defendants-Appellants, (MESSRS. STRONG & STRONG, attorneys, CATHERINE D. MCANDREW, on the brief).

The opinion of the court was delivered by
HANEMAN, J.

Plaintiff filed a complaint in the Chancery Division to quiet title to certain lands situate in Perth Amboy, title to which had been obtained by condemnation by Easton and Amboy Railroad Company (Easton). Defendants, the heirs

and devisees of Mary Chapman, deceased, appeal from the resulting judgment declaring that the plaintiff has a fee simple absolute title.

The facts are as follows: Easton was created as a result of the merger of Bound Brook and Easton Railroad Company (Bound Brook), created by L. 1872, c. 110, p. 314, and Perth Amboy and Bound Brook Railroad Company, created by L. 1858, c. 119, p. 278. The merger was authorized by L. 1872, c. 450, p. 1017, which provided, in part, that Easton "shall in all respects act and be governed by the laws now in force respecting the Bound Brook and Easton Railroad, as far as the same may be applicable." Easton was merged into Lehigh Valley Company of New Jersey (Lehigh) by agreement of consolidation filed in the office of the Secretary of State of New Jersey on July 29, 1903. Lehigh was subsequently merged into plaintiff Lehigh Valley Railroad Company by agreement effective January 1, 1950 and filed in the office of the Secretary of State of New Jersey.

By virtue of the power granted by the act of incorporation of Bound Brook (L. 1872, c. 110, p. 314) Easton surveyed and laid out a railroad route from the village of Bound Brook to Perth Amboy and filed a copy of said survey in the office of the Secretary of State. It was thereby disclosed that certain lands owned by Mary Chapman, situate in the City of Perth Amboy, were required for the construction of said railroad. Upon the inability of Easton and Chapman to agree for the purchase of said lands, Easton made an application to the Supreme Court of New Jersey on October 12, 1872, as provided by L. 1872, c. 110, Section 8, for the appointment of commissioners to examine and appraise the said land and assess the damages of Chapman. The court thereupon appointed three commissioners by order dated October 20, 1872. Said order provided, in part:

Appendix A

"Whereupon, it being made to appear to me that neither the said company nor its agents could agree with the said Mary Chapman for the use or purchase of said required land, I did * * * [designate] as the time and place for the appointment by me of three * * * commissioners *to examine and appraise the land* and assess the damages of the said Mary Chapman pursuant to said acts; * * *."

"* * * I, Edward W. Scudder, Justice of the Supreme Court of the State of New Jersey, * * * do hereby appoint Joseph L. Crowell, Wright Robins and Samuel Dally; three disinterested, impartial and judicious freeholders, residents in the county of Middlesex commissioners to *examine and appraise the land* of said Mary Chapman required as aforesaid, and to assess damages to be paid by the said Easton and Amboy Railroad Company for the land of said Mary Chapman so required as aforesaid, and her damages as aforesaid, pursuant to the provisions of the said acts, * * *." (Emphasis supplied).

On December 2, 1872 the above named commissioners made a report which, in part, reads:

"* * * we did thereupon * * * proceed to view and examine the said lands and premises mentioned and described in the said order and appointment, *and to make a just and equitable estimate a. ' appraisement of the value of the same*, and assessment of damages to be paid by the Easton and Amboy Railroad Company for such lands and damages aforesaid; * * *

We, the said commissioners do report that the sum of two thousand and seven hundred dollars *for the value of the lands aforesaid*, and the sum of two hundred and seventy-four dollars & fifty cents for the

damages aforesaid, be paid by the said The Easton and Amboy Railroad Company to the said Mary Chapman making together the sum of two thousand nine hundred and seventy-four dollars & fifty cents for said lands and damages aforesaid, and for all other damages which we, as commissioners as aforesaid are authorized to assess under and by virtue of the acts mentioned and referred to in the said order and appointment in which estimate is included the cost of making and maintaining unnecessary said lands." (Emphasis supplied).

Said report was duly filed in the County Clerk's office, Middlesex County, as provided by L. 1872, Chapter 110, Section 8.

Easton having paid the amount so determined to be due to Chapman, entered into possession of the said lands and constructed a railroad thereon according to said survey. The lands have continued in the peaceable possession of either Easton, Lehigh or Lehigh Valley Railroad Company.

By agreement dated January 31, 1958, plaintiff having abandoned the use of said land for its railroad purposes, entered into a contract with Fords Porcelain Works (Fords) for the sale thereof. The agreement of sale provided, *inter alia*, that in the event plaintiff's title to the premises proved to be unmarketable, the purchaser had the right to rescind the contract. The title insurance company to which Fords applied for title insurance questioned whether plaintiff had an absolute fee simple title. Plaintiff thereupon filed this action to quiet title to the lands. Issue having been joined, plaintiff moved for a summary judgment, which was granted on June 7, 1960. Defendants appealed to the Appellate Division and this court certified the appeal on its own motion.

Appendix A

Plaintiff contends that it obtained a title in fee simple absolute by virtue of the above referred to condemnation proceedings. The defendants, on the other hand, contend that plaintiff obtained a title in fee simple determinable, conditioned upon the continuous use of the lands for railroad purposes, and that upon the abandonment by plaintiff of that use, fee simple title absolute automatically reverted to them as heirs and devisees of Mary Chapman.

Although numerous decisions appear in our State Reports involving the title to realty of various railroad companies, this is the first time that we have been confronted with the direct question of whether a railroad obtained a fee simple absolute or a fee simple determinable title through condemnation.

At the outset it is appropriate that we repeat certain requirements for and distinctions in various titles which are qualified rather than absolute and certain basic rules of statutory construction. Those interests in real estate which are so qualified fall generally into one of three categories, *i. e.*, (1) estates on limitation, (2) estates on condition, and (3) estates on conditional limitation.

An estate on limitation, sometimes referred to as a base fee, qualified fee, determinable fee, or fee simple defeasible, 4 *Thompson on Real Property*, §2171, p. 708 (1940), *Restatement of the Law of Property*, §43 (1936), is an estate in fee simple which automatically expires upon the occurrence of a given event. The original grantor retains a possibility of reverter upon the breach of the stated condition and his grantee may convey his estate but the latter's grantee takes title subject to the same conditions and imperfections which adhered to it originally. *Thompson on Real Property, supra*, p. 708; *Restatement, supra*, §23; *Carpender* v. *New Brunswick*, 135 N. J. Eq. 397 (Ch. 1944); *Freeholders of the County of Cumberland* v. *Buck*, 79 N. J. Eq. 472 (Ch. 1911). Such estate is ordinarily created by

the use of words denoting duration of time such as "while," "during," "so long as" and the like. *Freeholders of the County of Cumberland* v. *Buck, supra*, although those or similar expressions are not an essential ingredient in the creation of an estate on limitation. See *Oldfield* v. *Stoeco Homes, Inc.*, 26 N. J. 246 (1958).

An estate on condition is similar to an estate on limitation but is distinguishable therefrom in that upon the occurrence of the specified limitative event the divesture of the title of the original grantee or his successors is not automatic. The holder of the reversionary interest must re-enter in order to defeat the originally granted fee. Parenthetically, it should be noted that the actual re-entry is no longer required, the right to re-enter being sufficient to sustain an action of ejectment. The estate of the original grantor or his successors has been denominated a power of termination. *Oldfield* v. *Stoeco Homes, Inc.*, *supra; Cornelius* v. *Ivins*, 26 N. J. L. 376 (Sup. Ct. 1857). The classical words for an estate on condition are "on condition that," "provided." *Freeholders of the County of Cumberland* v. *Buck, supra.*

An estate on conditional limitation is one which is conveyed to one person, so that upon the occurrence or failure of occurrence of a contingent event the estate shall pass from the original grantee to a third person. *Carpender* v. *New Brunswick, supra.*

A fee simple absolute title may be obtained by condemnation, if the statute authorizing the taking so provides. *Currie* v. *New York Transit Co. and National Docks Co.*, 66 N. J. Eq. 313 (E. & A. 1904); *Valentine* v. *Lamont*, 13 N. J. 569 (1953), *Hazek* v. *Greene*, 51 N. J. Super. 545 (App. Div. 1958), cert. den. 28 N. J. 58 (1958).

Although the taking of the right, title and interest of an owner of realty by condemnation should not be greater than necessary to effectuate the public use which called the pub-

lic power into play, a statutory authorization to take a fee simple title when some lesser interest only was required to accomplish the public purpose the legislature had in view, will not invalidate the statute. This is a legislative rather than a judicial question. *Valentine* v. *Lamont*, *supra*, pp. 576, 578; *United States Pipe Line Co.* v. *D. L. & W. R. R. Co.*, 62 N. J. L. 254 (E. & A. 1898).

Having disposed of the foregoing basic concepts concerning qualified fee simple title generally and title by condemnation authorized by statute, we proceed to the specific problem with which we are confronted.

Opinions from other states concerning the type of title obtained by railroads through condemnation, dealing as they do with the particular statutes of those states, are not particularly helpful in seeking the solution of the inquiry here involved. It likewise must be remembered that until the passage of the General Railroad law, L. 1873, c. 413, p. 88, charters were generally granted for railroad purposes in this State by special acts. The language granting the power of condemnation in those numerous enactments, although very similar, was not always identical. Consequently, even those opinions of our courts treating directly or indirectly with the quality of title obtained by railroads through condemnation are not necessarily apposite.

Originally, there seems to have been some doubt in this State as to whether a railroad corporation could or did, in any event, acquire more than an easement in lands acquired by condemnation. See *New York, etc. R. R. Co.* v. *Trimmer*, 53 N. J. L. 1 (Sup. Ct. 1890), *Taylor* v. *New York and Long Branch R. R. Co.*, 38 N. J. L. 28 (Sup. Ct. 1875). The question was finally laid at rest by *Currie* v. *N. Y. Transit Company and National Docks Ry. Co.*, *supra*, which held at p. 316 that "The quantity of interest which a railroad corporation obtains in land taken by it under the power of eminent domain is that which the statute con-

ferring the power authorizes it to acquire. The legislature may authorize the taking of a fee, or any less estate, in its discretion."

Counsel for defendants cites *Currie* v. *N. Y. Transit Co. and National Docks Ry. Co., supra*, and *Manning* v. *New Jersey Short Line Railroad*, 80 N. J. L. 349 (E. & A. 1910), for the conclusion that the plaintiff obtained by condemnation only a fee simple determinable title.

In considering these two cases, it must be borne in mind that title was obtained in *Currie* by condemnation under the General Railroad law, *supra*, and in *Manning* under the Eminent Domain Act, L. 1900, c. 53, p. 79. However, there is grave doubt that there would eventuate any different result from that herein expressed had title been obtained in the matter *sub judice* by condemnation under either of said statutes.

In *Currie*, plaintiffs sought to compel the removal of a pipe line installed by N. Y. Transit Co. with the consent of National Docks Ry. Co., from a portion of a railroad right of way obtained by condemnation by a predecessor in title of National Docks Ry. Co. under the General Railroad law. Plaintiffs contended that National Docks Ry. Co. "obtained by the condemnation proceeding 'a right of way for railroad purposes over and across the land in question, leaving the fee therein, and in and to the soil thereof, vested in the appellants'." 66 N. J. Eq. 314. Plaintiffs there argued, in part, that the language of that statute, which reads: "* * * and on payment or tender of the amount awarded as hereinafter provided, the said company is hereby empowered to enter upon and take possession of the said lands or materials *for the purposes aforesaid* [railroad purposes]" (emphasis supplied) restricted the condemnor to grant of an easement. The question, therefore, was whether an easement or some type of fee simple title was obtained by condemnation. The issue was not whether the fee was absolute

or determinable. The court was not required to decide this question. In sustaining the dismissal of plaintiffs' complaint by the Chancery Court, the Court of Errors and Appeals said, however, at p. 318:

> "Where land is held by a railroad company under a deed containing the words of this statute, it can hardly be doubted that the conveyance, having been made in consideration of the payment of the full value of the land, operates to strip the grantor of all *present* estate, right, title and interest in the land, and to vest the same in the company *so long at least as its corporate life continues to exist and so long as its charter prescribes*, * * *." (Emphasis supplied).

The phrase "at least" is plainly indicative that the court was intentionally not determining, at that point, whether the fee was absolute or determinable.

And again, at p. 318:

> "It is contended that, because the right of the company to enter and take possession of the land, after payment of the award, is given by the statute 'for the purposes aforesaid,' the landowner still retains such an interest in the land as will enable him to restrain an unauthorized use of it by the company. But the words quoted do not operate to restrict the quantity of the interest which passes to the company by virtue of the condemnation proceeding, *or to reserve to the landowner any rights in the lands taken.* They merely limit the uses to which the lands may be put. And it is to be observed that this limitation is not confined to lands taken by the exercise of the power of eminent domain. The charter of the company (the General Railroad law) imposes it equally upon lands acquired by conveyance from the owner. Whether the land be acquired by the

one method or the other, when the company enters upon and takes possession thereof it does so for the purpose of subjecting it to the uses which its charter authorizes.

Nor does the fact that, *while in possession* and so using the land, the company subjects it to an additional and unauthorized use operate to divest it, to any extent, of the estate which it has acquired therein. *McKelway* v. *Seymour*, 5 *Dutch.* 321.

The complainants' bill therefore was properly dismissed, for, as the condemnation proceeding vested in the Bergen Neck Railroad Company *the whole present estate in the land, and that estate was not divested by the act of its successor* in subjecting the land to the additional and unauthorized use complained of, the complainants had no interest therein for the protection of which they were entitled to invoke the aid of a court of equity. *Barnett* v. *Johnson*, 2 *McCart.* 481." (Emphasis supplied).

The court, by the second quotation above, held that in spite of the fact that the General Railroad law contained the quoted proviso, a provision absent in L. 1872, c. 310, the railroad obtained a fee simple estate. The court did not hold that the condemnor obtained a fee simple determinable. The gist and effect of the court's conclusion by way of *dictum* is that the railroad obtained a fee simple title and that plaintiffs had no further interest in the land for the protection of which they were entitled to invoke the aid of a court of equity. Although *dicta* on the question of the type of fee simple title which was obtained and hence not binding, it was *dicta* of our court of last resort and entitled to great weight. *D. L. & W. R. Co.* v. *Division of Tax Appeals*, 2 N. J. Super. 93 (App. Div. 1949), aff'd 3 N. J. 27 (1949), appeal dismissed, 338 U. S. 946, 70 S. Ct. 488 (1950);

Appendix A

English v. *Stokes Molded Products, Inc.*, 43 N. J. Super. 68 (App. Div. 1956); *Hughes* v. *Eisner*, 14 N. J. Super. 58 (App. Div. 1951), appeal dismissed 8 N. J. 228 (1951).

Manning was an appeal from a condemnation award under the Eminent Domain act, *supra*. The question there involved was whether plaintiffs were entitled to compensation for the additional burden placed upon their remaining lands for the lateral support of the railroad right of way. In sustaining that right, the court said (80 N. J. L. 352):

> "The condemnation, therefore, is a legal substitute for a voluntary conveyance, and carries with it every right that is necessary to enable the company 'to have, hold, use, occupy, possess and enjoy' the land for the special purposes of a railroad. The landowner can no more derogate from the condemnation than he can from an express grant."

Far from being authority to sustain defendants' position, *Currie* and *Manning* are at least implied authority for plaintiff's position.

We come, then, to a construction of the specific statute here involved.

It must be remembered that the reversion alleged by defendants results from a forfeiture. A forfeiture is:

> "* * * The common and general definition of the word 'forfeit' is 'lost by omission or negligence or misconduct.' It is in this general sense that the word 'forfeiture' is used when it is said that equity will not actively lend its aid to enforce a forfeiture or that equity will relieve against unjust forfeitures. A forfeiture is in the nature of a penalty for the doing or the failure to do a particular thing, *e. g.*, using leased premises for a purpose prohibited by the lease, failing to pay rent, and the like. To incur a forfeiture is to

fail to keep an obligation." *Rankin* v. *Homestead Golf & Country Club, Inc.*, 135 N. J. Eq. 160, 165 (Ch. 1944).

See also *Jador Service Co.* v. *Werbel*, 140 N. J. Eq. 188 (E. & A. 1947). Penalties and forfeitures are not favored at law, *Grigg* v. *Landis*, 21 N. J. L. 494 (E. & A. 1870), but contrawise, it has been said that the "law abhors a forfeiture." *Oldfield* v. *Stoeco Homes, Inc., supra.* A recognized rule of construction dictates that an instrument, when a choice exists, is to be construed against rather than in favor of a forfeiture. *Basic Iron Ore Co.* v. *Dahlke*, 108 N. J. Eq. 68 (E. & A. 1930). And where it be doubtful whether a clause in a deed is a covenant or a condition, the former is preferred. *Woodruff* v. *Woodruff*, 44 N. J. Eq. 349 (Ch. 1888); *Oldfield* v. *Stoeco Homes, Inc., supra.*

L. 1872, c. 110, p. 314, section 1 provides that Bound Brook being a body corporate and politic, "shall be capable of purchasing, holding and conveying any lands, tenements, goods and chattels whatsoever, necessary or expedient to the objects of this incorporation." Section 7 provides that when Bound Brook shall have determined upon the location of its road and deposited a survey thereof in the office of the Secretary of State it shall then be lawful for the said company "to enter upon, take possession of, hold, have, use, occupy" lands shown as necessary for its purposes by said survey upon payment of compensation as thereafter provided in said statute

Section 8 provides:

> "That when the said company, or its agents cannot agree with the owner or owners of such required lands or materials for the use or purchase thereof * * *, a particular description of the lands or materials so required for the use of said company in the construction of said road, shall be given in writing, under oath or affirmation of some engineer or proper agent of the said com-

pany, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners, if known, * * * to one of the justices of the supreme court of this state, who shall cause the said company to give notice thereof * * * [that] he shall appoint * * * three disinterested, impartial and judicious freeholders * * * to examine and *appraise the land* or materials and to assess the damages * * * and it shall be the duty of the said commissioners * * * to meet at the time and place appointed and proceed to view and examine the said land or materials, and to make a *just and equitable estimate or appraisement of the value* of the same, and *assessment of damages* that shall be paid by the said company for such lands or materials and damages aforesaid * * * which report shall be made in writing, * * * and filed * * * in the clerk's office of the county in which the lands or materials are situate, to remain on record therein, which report or copy thereof, certified by the clerk of the said county, shall at all times be considered as *plenary evidence of the right of said company to have, hold, use, occupy, possess and enjoy* the said lands or materials, * * *." (Emphasis supplied).

Section 9, which provides for an appeal in the event of dissatisfaction of either party with the determination of the condemnation commissioners by directing an issue for trial by jury, provides further, in part:

"and it shall be the duty of the said jury to assess the value of the said land or materials and damages sustained; and if they shall find a greater sum than the commissioners shall have awarded in favor of the said owner or owners, then judgment thereon, with costs, shall be entered against the said company * * * but

> if the said jury shall be applied for by the said owner or owners, *and shall find the same or a less sum than the company shall have offered* or the commissioners awarded, then the said cost to be paid by said applicant or applicants, * * * but such application shall not prevent the company from taking the said land or materials upon filing the aforesaid report, the value in damages being first paid * * *." (Emphasis supplied).

Bound Brook was authorized by Section 1 of the charter act to hold and convey any lands and tenements without any restriction that a subsequent conveyance by it should be for railroad use only. This is plainly indicative of the right to obtain and convey a title in fee simple absolute.

Additionally, the filed report of the condemnation commissioners is directed by Section 8 to be considered "plenary evidence of the right of said company to have, hold, use, occupy, possess and enjoy the said lands." As stated in *New York, Susquehanna and Western Railroad Co. v. Trimmer, supra*, at p. 3:

> "There seems to be no reason why this language, as it stands in this statute, is to be interpreted differently from what it would if it were found in a deed from a landowner to the company."

Such words contained in a deed would suffice, absent express words of limitation, to convey a fee simple absolute title. Counsel for defendants conceded on the oral argument that a voluntary conveyance to Easton without specific limitation therein contained would serve to convey a fee simple absolute title. Title obtained by condemnation was of the same quality as title obtained by a voluntary conveyance. The statute makes no distinction or difference in the titles obtained by either method. A landowner can no more derogate from the title authorized to be acquired by

condemnation than he can from a title obtained by his voluntary grant. See *Manning* v. *N. J. Short Lines R. R. Co., supra; New York, Susquehanna and Western Railroad* v. *Trimmer, supra; Currie* v. *N. Y. Transit and National Docks Ry. Co., supra; DeCamp* v. *Hebernia Railroad Co., supra.*

Research has not disclosed a New Jersey case which directs the manner in which the condemnation commissioners appointed under L. 1872, c. 310, or any of the other special charter acts of railroad companies containing similar words, shall appraise the "value" of the "land"—whether the appraisal shall be predicated upon the full reasonable fair market value recognizing that the condemnee is divested of all present title or possibility of future title or whether an allowance should be made from such full value for the possibility of reverter or the power of termination. However, the discussions in *Van Winkle* v. *Rail Road Co.*, 14 N. J. L. 162 (Sup. Ct. 1833) and *New Jersey Rail Road and Tr. Co.* v. *Suydam*, 17 N. J. L. 25 (Sup. Ct. 1839); *Coster, et al.* v. *New Jersey Railroad Co.*, 23 N. J. L. 227 (Sup. Ct. 1852), which involved statutory language, although not identical, yet comparable to the statute *sub judice*, lead to the conclusion that value was to be ascertained upon the basis that the condemnee retained no possibility of reverter or power of termination since there is no intimation that allowance from the actual full market value was to be made for the value of such possibility or power.

Defendants do not suggest that the amount directed to be paid by the commissioners and actually paid by the plaintiff for the lands *sub judice* was less than the full fair market value at the time of the exercise of the power of eminent domain. What this court said in *Valentine* v. *Lamont*, 13 N. J. 569 (1953), at p. 579, is particularly apt in this connection:

Appendix A

"* * * Where, as here, the land is being acquired for the purposes of schools it is extraordinarily difficult to see how anything less than a fee simple absolute title was intended by the statute. The condemnation for this use involved exclusive possession and an exclusive right of possession that might have lasted forever, and the payment in the statutory manner of the full market value of the property, which figure was based on the full right, title and interest of the owner, carries with it a presumption of the full payment for the estate in fee. The owner was entitled to no less than full compensation and was justly compensated, and it would be, as Mr. Justice Case pointed out in *Carroll* v. *City of Newark*, *supra*, *p.* 331,

> 'an exaggeration of the essence of private ownership and a mulcting of the public purse to hold that when an individual has had his lands taken for public use and has been fully paid for those lands, he, or his heirs after him, should be entitled to payment anew whenever the character of the public use changes, simply because it does change.'

On the other hand, it would be highly inequitable to merely compensate an owner where we have such a taking as we have here on the basis of a fee simple determinable title which necessarily would be on a monetary value considerably less than he would be entitled to receive for a fee simple absolute title. For he would normally be deprived of the dominion and control over his right, title and interest in the property, not only during his own lifetime but that of any of his heirs, subject only to the theoretical contingency that at some future indefinite time the public use might be abandoned and he have a right of reverter in the property. Such a result, in the absence of clear and express language

in the statute that only a fee simple determinable title was to be taken, would make a fraud of the constitutional guaranty that private property shall not be taken for public use without just compensation."

That the statute contemplated a fee simple absolute title by condemnation is further demonstrated by the provision for costs upon appeal, Section 9, L. 1872, *supra*. The criterion of who shall bear the costs is whether the final award on an appeal is greater or less than "the company shall have offered or the said commissioners awarded." Clearly this provision is indicative of a concept that the same consideration shall be paid upon condemnation as upon a voluntary conveyance, *i. e.*, the fair market value. It is only logical to conclude that the condemnor was to be vested with the identical type of title regardless of the manner employed in obtaining title since the same consideration was to be paid in either event.

We conclude that plaintiff has a title in fee simple absolute.

Affirmed.

A True Copy

John H. Gildea
Clerk

Appendix B

Mandate on Affirmance

SUPREME COURT OF NEW JERSEY
APPEAL DOCKET NO. 3389

CIVIL ACTION

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy, and her heirs, devisees and personal representatives, etc., et al.,

Defendants-Appellants.

This cause having been duly argued before this Court by Mr. John VR. Strong and Catherine D. McAndrew, counsel for the appellants and Mr. Charles W. Hutchinson, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix B

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fifth day of June, 1961.

JOHN H. GILDEA
Clerk

FILED

Jun 5 1961

JOHN H. GILDEA
Clerk

Appendix C

Order Denying Rehearing

SUPREME COURT OF NEW JERSEY

DOCKET NO. 3389

On Petition for Rehearing

LEHIGH VALLEY RAILROAD COMPANY,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, et al.,

Defendants-Appellants.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 30th day of June 1961.

JOHN H. GILDEA
Clerk

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Jun 30 1961

JOHN H. GILDEA
Clerk

Appendix D

Chapter CX—An Act to Incorporate the Bound Brook and Easton Railroad Company

1. Be It Enacted by the Senate and General Assembly of the State of New Jersey, That Ezekiel Montgomery Patterson, William R. Robins, William Patterson, John D. Patterson, S. V. R. Patterson, and such other persons as may hereafter be associated with them, shall be, and they are hereby ordained, constituted and declared to be a body corporate and politic, in fact and in law, by the name of "Bound Brook and Easton Railroad Company," and by that name they and their successors and assigns shall and may have continual succession, and shall be persons in law, capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, and shall have power to make and use a common seal, and the same at pleasure to alter, and they and their successors by that name and style shall be capable of purchasing, holding and conveying any lands, tenements, goods and chattels whatsoever, necessary or expedient to the objects of this incorporation.

* * *

6. And be it enacted, That the president and directors of the said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey and lay out and construct a railroad from some suitable point at or near the village of Bound Brook, in the county of Somerset, to a suitable point on the Delaware river at or within ten miles of Phillipsburg, in the county of Warren, with the privilege of connecting with any railroad or railroads now or hereafter to be built; the said railroad not to exceed one hundred feet in width, except

in such places where, from the depth of the excavation or the height of the embankment, it is necessary to take more land for the slope and protection of the side banks of said railroad, in which case so much land as will be necessary for the purpose, and no more, shall be taken, with as many sets of tracks and rails as they may deem necessary.

7. And be it enacted, That it shall be lawful for the said company, their officers, agents, engineers, superintendents and others in their employ, to enter at all times upon all lands, bridges and waters for the purpose of exploring, leveling, surveying and laying out the route of said railroad, and of locating and of subsequently altering the location thereof, doing no unnecessary damage to private property; and when any part of the route and location of such road, or the alteration or location shall have been determined upon, and a survey thereof deposited in the office of the secretary of state, then it shall be lawful for the said company, its officers, engineers, agents, superintendents, contractors, workmen and other persons in their employ, to enter upon, take possession of, hold, have, use, occupy and excavate any such lands, and to erect embankments, bridges and all other works necessary to lay rails, and to do all other things which shall be suitable or necessary for the completion or repair of said road, subject to such compensation as is hereinafter provided; provided always, that the payment or tender of payment of all damages for the occupancy of lands through which the said railroad may be laid out, be made before said company, or any person under their direction or employ, shall enter upon or break ground in the premises, except for the purpose of surveying and laying out the said road, unless the consent of the owner or owners of such land be had and obtained.

Appendix D

8. And be it enacted, That when the said company, or its agents, cannot agree with the owner or owners of such required lands or materials, for the use or purchase thereof, or when, by reason of the legal incapacity or absence of such owner or owners, no such agreement can be made, a particular description of the lands or materials so required for the use of said company in the construction of said road, shall be given in writing, under oath or affirmation of some engineer or proper agent of the company, and also the name or names of the occupant or occupants, if any there be, and of the owner or owners, if known, and their residence, if the same can be ascertained, to one of the justices of the supreme court of this state, who shall ...ase the said company to give notice thereof to the persons interested, if known and in this state, or if unknown or out of this state, to make publication thereof as he shall direct, for any time not less than ten days, and to assign a particular time and place for the appointment of the commissioners hereinafter named; at which time upon satisfactory evidence to him of the service or publication of such notice aforesaid, he shall appoint, under his hand and seal, three disinterested, impartial and judicious freeholders, residents in the county in which the lands or materials in controversy lie, or the owner resides, commissioners to examine and appraise the land or materials, and to assess the damages, upon such notice to be given to the persons interested as shall be directed by the justice making such appointment, to be expressed therein not less than ten days; and it shall be the duty of the said commissioners (having first taken and subscribed an oath or affirmation before some person duly authorized to administer an oath, faithfully and impartially to examine the matter in question and to make a true report according to the best of their skill and understanding), to meet at the time and place appointed, and proceed to view and

examine the said land or materials, and to make a just and equitable estimate or appraisement of the value of the same, and assessment of damages, as shall be paid by the said company for such lands or materials and damages aforesaid (the said commissioners taking in consideration the benefits derived by the land owner or owners from said railroad, and assess the land and damages accordingly); which report shall be made in writing, under the hands and seals of the said commissioners, or any two of them, and filed within ten days thereafter, together with the aforesaid description of the land or materials, and the appointment and oaths or affirmations aforesaid, in the clerk's office of the county in which the lands or materials are situated, to remain on record therein, which report, or a copy thereof, certified by the clerk of the said county, shall at all times be considered as plenary evidence of the right of the said company to have, hold, use, occupy, possess and enjoy the said land or materials, or of the said owner or owners to recover the amount of said valuation, with interest and costs, in an action of debt, in any court of competent jurisdiction, in a suit to be instituted against the company, if they shall neglect or refuse to pay the same for twenty days after the demand of their treasurer, and shall, from time to time, constitute a lien upon the property of the company, in the nature of a mortgage; and the said justice of the supreme court shall, on application of either party, and on reasonable notice to the other, tax and allow such costs, fees and expenses to the justice of the supreme court, commissioners, clerks and other persons performing any of the duties prescribed in this section, as they or he shall think equitable and right, which shall be paid by said company.

9. And be it enacted, That in case the said company or the owner or owners of the said land or materials shall be

dissatisfied with the report of the commissioners named in the preceding section, and shall apply to the justices of the supreme court at the next term after the filing of the said report, the court shall have the power, upon good cause shown, to set the same aside, and thereupon to direct a proper issue for the trial of the said controversy to be formed between the said parties, and to order a jury to be struck, and a view of the premises or materials to be had, and the said issue to be tried at the next circuit court to be holden in the said county, upon the like notice, and in the same manner as other issues in the said court are tried; and it shall be the duty of the said jury to assess the value of the said land or materials and damages sustained; and if they shall find a greater sum than the commissioners shall have awarded in favor of the said owner or owners, then judgment thereon, with costs, shall be entered against the said company, and execution awarded therefor; but if the said jury shall be applied for by the said owner or owners; and shall find the same or a less sum than the company shall have offered or the said commissioners awarded, then the said cost to be paid by said applicant or applicants, and either deducted out of the said sum found by the said jury, or execution awarded therefor, as the court shall direct; but such application shall not prevent the company from taking the said land or materials upon filing the aforesaid report, the value and damages being first paid, or upon a refusal to receive the same upon a tender thereof, or the owners thereof being under any legal disability, the same being first paid into the court of chancery.

* * *

13. And be it enacted, That the said company may have and hold such real estate at or near either terminus of their railroad, and at any other points along the line of said

road, where the directors may think proper to establish depots, and may erect and build thereon houses, warehouses, machine shops, wharves, slips and such other buildings and improvements as they may deem expedient for the safety of the property, and the construction of carriages, engines and other necessary uses, and take and receive the rents, profits and emoluments thereof, and shall have the privilege and authority to erect, build and maintain over such rivers, creeks and streams as the road may cross such piers, bridges and other facilities as they may think expedient and necessary for the full enjoyment of all the benefits conferred by this act; provided, that the said company, whenever it may become necessary to cross any navigable river or creek with their road, shall construct a bridge or bridges, with suitable and sufficient draws, so as not to unnecessarily impede the navigation thereof.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 453

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives and those of any of their unknown executors, administrators, grantees, assignees or successors in right, title and interest, and all persons claiming by or through her or any of them, MARY HUSSEY BEARDSLEY, widow, ROBERT V. B. HORTON and ELIZABETH B. HORTON, his husband, MALCOLM CAMPBELL and [illegible] his wife, HELENA B. CAMPBELL, RUTGER DEY and THOMAS M. DEY, his husband, HELEN B. MANCHEE, individually and as executrix of the last will of Helena B. Campbell and as executrix of Anna Lloyd Bowyer, and RICHARD B. MANCHEE, her husband, FIRST NATIONAL IRON BANK OF MORRISTOWN, as executor of the last will of Helena B. Campbell and as guardian of Anna Lloyd Bowyer, and as executor of the last will of KATHERINE N. BOWYER, ALIDA BEAVOR HOUSMAN, KATHERINE B. STRONG individually and as executrix of the last will of KATHERINE N. BOWYER and JOHN VR. STRONG, her husband, HORACE HEPBURN as executor of the last will of KATHERINE N. BOWYER, ANTHONY RUTGERS NELSON and MARY NELSON, his wife, HELEN N. BENT and CHARLES BENT, her husband, JOSTAN C. HALVORSEN, sued as FLORENCE ROBINSON, trading as FORDS PORCELAIN WORKS, INC., and all persons claiming by or through them or any of their unknown heirs, devisees and personal representatives, and those of any of their unknown successors in right, title and interest,

Defendants-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR RESPONDENT

CHARLES W. HUTCHINSON,
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70 Sip Avenue
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

LEHIGH VALLEY RAILROAD COMPANY, a Corporation,

Plaintiff-Respondent,

vs.

MARY CHAPMAN, deceased, late of Perth Amboy and her heirs, devisees and personal representatives and their or any of their heirs, devisees, executors, administrators, grantees, assigns or interest, and any and all persons claiming by or through them or any of them; MARY HUSE BEARDSLEY, widow; ROBERTA B. HORTON and LUCIAN B. HORTON, her husband; MALCOLM CAMPBELL surviving spouse of HELENA B. CAMPBELL; RUTH N. DILL and THOMAS M. DILL, her husband; HELEN B. MANCHEE, Individually and as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL, and RICHARD B. MANCHEE, her husband; FIRST NATIONAL IRON BANK OF MORRISTOWN, as co-trustee u/l/w/t of HELENA B. CAMPBELL and as co-guardian of ALIDA BEACH BONSALL and as co-trustee u/l/w/t of KATHERINE N. BONSALL; ALIDA BEACH BONSALL; KATHERINE B. STRONG, Individually and as co-trustee u/l/w/t of KATHERINE N. BONSALL and JOHN VR. STRONG, her husband; HORACE JEFFERS, as co-trustee u/l/w/t of KATHERINE N. BONSALL; ANTHONY RUTGERS NIELSON and MARY NIELSON, his wife; HELEN N. BENT and CHARLES BENT, her husband; ROSLYN C. HALVORSEN, widow; FLORENCE ROBINSON, widow; FORDS PORCELAIN WORKS, INC.; and unknown claimants and their heirs, devisees and personal representatives, and their or any of their successors in right, title and interest,

Defendants-Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Supreme Court of New Jersey, No. A-108, decided June 5, 1961, is reported in 35 N. J. 177 (1961) and 171 A. 2d 653.

Jurisdiction

1. Respondent denies that the validity of a state statute is here drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. It, therefore, denies that the jurisdiction of this Court is properly invoked under 28 U.S.C.A. sec. 1257(3). It further denies that the cases cited by petitioners, in which this Court reviewed decisions of lower Federal Courts, support petitioners' claim that this Court has jurisdiction under 28 U.S.C.A. sec. 1257(3).

2. Respondent denies that any constitutional question here exists or that any such question was properly raised or preserved in the state court or that any such question was considered or decided either directly or by implication by the state court.

Questions Presented

1. Is any substantial constitutional question involved in the holding of the state court that petitioner had a fee simple absolute title to certain lands which were condemned under the provisions of the special charter of its predecessor in title (L. 1872, c. 110) in 1873?

2. If a constitutional question is involved and the jurisdiction of this court sustained, was the question properly raised and preserved below?

Statement of the Case

1. Respondent agrees with petitioners' "Statement of the Procedural History of the Case."

2. It believes that petitioners' "Statement of Facts Material to the Question Involved" is in many respects

both incomplete and inaccurate. A counter-statement follows:

Under section 1 of its special charter respondent's predecessor was authorized to hold and convey lands without restriction. Section 8 of the charter provided that said predecessor could agree with owners for the purchase of land needed. The section also provided a method for condemning the land in the event of a failure to agree. In 1873 respondent's predecessor required a portion of the lands of Mary Chapman for its right of way. It could not agree on a purchase of said land and the procedure for condemnation was duly followed and Mary Chapman was awarded the full value of her property which was condemned.

Approximately 86 years later respondent believed the subject land was no longer required for railroad purposes and it contracted to sell it to an industry which had a use for it. The contract was, of course, subject to obtaining the required permission of the New Jersey Board of Public Utility Commissioners.

Both the trial and appellate courts of New Jersey held that the legislature could properly authorize the acquisition by a quasi-public corporation in condemnation of a fee simple absolute, that the language of the subject special charter authorized the acquisition of an absolute fee, that the use for which the land was acquired and the fact that Mary Chapman was awarded full payment for her entire interest in the subject land, all indicated that, in fact, an absolute fee was acquired by respondent's predecessor and that petitioners had no interest in the subject land.

3. Respondent denies that a federal question was raised before the New Jersey courts. No mention is made of any such question in the pleadings. No such question was presented to or argued before the trial court. Petitioners

main brief to the appellate court does not include discussion of any such question. No such question was mentioned in respondent's answering brief. It first appears (improperly we claim) in petitioners reply brief. No such question was decided by the appellate court or even discussed in its opinion. Furthermore, the Attorney General of the State of New Jersey was not joined in the proceeding nor was he given any notice as required when the constitutionality of a state statute is involved.

ARGUMENT

POINT I

No constitutional question arises in the instant case.

Petitioners do not and can not claim that any interest to which they are entitled was taken without just compensation. For their predecessor in title received just compensation for her entire interest in the subject property.

Nor should petitioners be able to claim that the state court had no right to construe the subject special charter as empowering the railroad to acquire an absolute fee. For the construction of a state statute is clearly and peculiarly within the judicial province of the state court.

Their claim, as we understand it, is that, as construed, the subject special charter contravenes the due process clause of the Fourteenth Amendment for the reason that the legislature could never empower a railroad to acquire an absolute fee title to lands required for a right of way by eminent domain.

No authority is cited to establish such a constitutional limitation on legislative discretion and the proposition is clearly opposed to the rule that questions of the extent, amount or title of property to be taken on condemnation rests wholly in the discretion of the legislature, subject

only to the restraints that just compensation must be paid and the determination made in good faith. See *U. S. v. Meyer*, 113 F. 2d 387, cert. denied; *Meyer v. U. S.*, 311 U. S. 706.

There is no excess of condemnation involved in the sense that no more land was taken than needed. The question raised is limited to the quality of title and not the quantity of land.

We see nothing in the due process clause of the Fourteenth Amendment which prevents a state legislature from allowing a railroad to acquire by condemnation title to land of the same quality as it could acquire by purchase and agreement. We see no benefit to a condemnee in being forced to retain without compensation some sort of reversionary interest based on some indefinite and indefinable condition. On the contrary for respondent to be required now to forfeit some interest in land for which its predecessor has fully paid may constitute a taking of its property contrary to the due process clause of the Fourteenth Amendment.

POINT II

No constitutional question was properly raised or preserved in the state court.

The state appellate court was silent in its opinion with respect to any federal question. The burden is, therefore, on petitioners to show that such question was properly raised of record.

The fact is that the constitutionality of the special charter, as construed, was first mentioned in petitioners reply brief in the appellate court. Because respondent's answering brief mentioned no such question, it was improperly raised in the reply brief. Furthermore, no constitutional question had previously been raised in the pleadings in the trial court or in the main briefs.

New Jersey rules of court (R.R. 4:37-2) provide as follows:

> "When the validity of a statute, executive order, franchise or constitutional provision of this State is drawn in question in any action to which the State or an officer or agency thereof is not a party, the court shall require notice be given the Attorney General of the State; and the State shall upon timely application be permitted to intervene in the action. When the validity of an ordinance, regulation or franchise of a governmental subdivision of this State affecting the public interest is drawn in question in any action to which the governmental subdivision or an officer or agency thereof is not a party, the court shall require notice be given the county counsel, city counsel, corporation counsel, or other chief legal officer of the subdivision thereof affected; and the subdivision shall upon timely application be permitted to intervene in the action."

No notice was given to the Attorney General of the State as required.

We, therefore, submit that the question as to the constitutionality of the subject special charter was not raised or preserved in the state court.

CONCLUSION

Respondent respectfully submits that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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